UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MERCK, JOHNSON, and OLMSCHEID
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class LASHONDA M. POLLACK
United States Army, Appellant

ARMY 20020663

1st Cavalry Division
Debra L. Boudreau (arraignment) and Michael B. Neveu (trial), Military Judges
Lieutenant Colonel Kevan F. Jacobson, Staff Judge Advocate (trial)
Major James R. Agar II, Acting Staff Judge Advocate (SJAR)
Lieutenant Colonel Christopher J. O'Brien, Staff Judge Advocate (addendum)

For Appellant: Colonel Robert D. Teetsel, JA; Lieutenant Colonel Mark Tellitocci, JA; Major Sean S. Park, JA; Captain Lonnie J. McAllister II, JA (on brief).

For Appellee: Colonel Steven T. Salata, JA; Lieutenant Colonel Mark L. Johnson, JA; Major Kerry E. Maloney, JA; Captain Jerald A. Parisella, JA (on brief).

29 August 2005

MEMORANDUM OPINION

OLMSCHEID, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to her pleas, of absence without leave, wrongful use of marijuana, larceny (four specifications), and forgery (three specifications), in violation of Articles 86, 112a, 121, and 123, Uniform Code of Military Justice, 10 U S.C. §§ 886, 912a, 921, and 923 [hereinafter UCMJ]. Appellant was sentenced to a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances, reduction to Private E-1, and a $1000.00 fine. The convening authority approved the sentence as

adjudged and ordered that 252[1] days of confinement credit be applied against the sentence to confinement.

This case is before the court for review pursuant to Article 66, UCMJ. We have considered the record of trial, appellant's assignments of error, and the government's reply thereto. Appellant asserts that the convening authority erroneously approved forfeiture of all pay and allowances when appellant had already completed her sentence to confinement. Appellant also asserts that she is entitled to relief for pretrial confinement credit that was not applied to her confinement. The government agrees that appellant should be granted relief on both issues.[2] We agree as well, and will grant appropriate relief in our decretal paragraph.

DISCUSSION

Appellant was sentenced on 21 June 2002, and released from custody that day because of her confinement credit. She then applied for voluntary excess leave on 19 August 2002. Her request was approved by the convening authority on 22 August 2002. As such, there was over a two-month period between appellant's release from confinement and her placement in a voluntary excess leave status.

The convening authority erred when he approved the forfeiture of all pay and allowances in this case. "When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused." Rule for Courts-Martial 1107(d)(2) discussion; *see also United States v. Warner*, 25 M.J. 64, 66-67 (C.M.A. 1987). However, appellant is not entitled to pay and allowances while on excess leave. *See United States v. Paz-Medina*, 56 M.J. 501, 503 (Army Ct. Crim. App. 2003). In this case, there was a period when appellant was not in confinement and not on excess leave. She should not have been subjected to total forfeitures during that time.

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[1] The military judge ordered that appellant be given eighty-four days of confinement credit for the time she spent in pretrial confinement. The military judge also awarded appellant an additional 168 days of confinement credit, pursuant to Article 13, UCMJ, for the unduly harsh conditions of appellant's pretrial confinement.

[2] On the issue of forfeitures, the government asserts that appellant should only receive credit for one-third pay from 4 July 2002 until the day her excess leave took effect, which was approximately 22 August 2002. On the issue of credit, the government asserts that, if appellant "did not receive pay for the excess period of pretrial confinement credited by the judge," she should receive seventy-two days credit applied against her fine and forfeitures.

Appellant is also entitled to a remedy for seventy-two days of confinement credit because there was insufficient confinement adjudged against which to offset the credit. *See United States v. Ponzi*, 29 M.J. 601, 603 (A.C.M.R. 1989). We will grant appellant's request to apply the credit against the approved forfeiture of pay and the fine.

CONCLUSION

The findings of guilty are affirmed. Reassessing the sentence on the basis of the errors noted and the entire record, we affirm only so much of the sentence as provides for a bad-conduct discharge, confinement for six months, and reduction to Private E1. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of her sentence set aside by this decision are ordered restored as mandated by Article 75(a), UCMJ.

Senior Judge MERCK and Judge JOHNSON concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court